

1980

Torts—Parental Immunity for Negligent Instruction Denied—Romanik v. Toro Co., 277 N.W.2d 515 (Minn. 1979)

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

(1980) "Torts—Parental Immunity for Negligent Instruction Denied—Romanik v. Toro Co., 277 N.W.2d 515 (Minn. 1979)," *William Mitchell Law Review*: Vol. 6: Iss. 1, Article 7.

Available at: <http://open.mitchellhamline.edu/wmlr/vol6/iss1/7>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

The Minnesota Supreme Court in *Hepfel* underscored the significance of the interests of all parties to the paternity action in the accurate determination of paternity and noted that the best method to protect those interests was adjudication in an adversary proceeding.⁶³ The complexity and importance of the paternity action magnifies the necessity for court-appointed counsel. The court, in effect, declined only to label its holding a constitutional right, in expectation that the pending Uniform Parentage Act would make a constitutional ruling unnecessary.

**Torts—PARENTAL IMMUNITY FOR NEGLIGENT INSTRUCTION
DENIED—*Romanik v. Toro Co.*, 277 N.W.2d 515 (Minn. 1979).**

Around the turn of this century, American courts carved out a rule immunizing parents from tort actions brought by their children.¹ Based upon the need for harmony in the home² and preservation of the family

In re Estate of Pakarinen, 287 Minn. 330, 334, 178 N.W.2d 714, 716 (1970), *appeal dismissed*, 402 U.S. 903 (1971).

63. See 279 N.W.2d at 348.

1. The genesis of the rule lies in a series of state court decisions sometimes referred to as "the great trilogy." See Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 181-82 (1961). Mississippi became the first state to recognize parent-child tort immunity. See *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891). In *Hewlett*, the Mississippi Supreme Court adamantly refused to allow an action between a parent and child for an intentional personal tort. *Id.* at 711, 9 So. at 887. Although limited authority against the immunity existed in England, see *Ash v. Ash*, 90 Eng. Rep. 526 (1696) (daughter successfully sued her mother for assault, battery, and false imprisonment), the *Hewlett* court neither cited any authority nor discussed any rationale other than the "repose of families." See 68 Miss. at 711, 9 So. at 887. This rationale is of tenuous application in *Hewlett* because the child directed the action against the estate of a deceased parent. *Id.* at 707, 9 So. at 886. *Hewlett* was followed by *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903), in which the Tennessee Supreme Court denied a minor plaintiff recovery against a parent for alleged cruel and inhuman treatment. *Id.* at 393, 77 S.W. at 665. Although the cruel treatment was inflicted by a stepmother, the court held that the father was responsible and, therefore, the child was barred from bringing suit against the father. *Id.* at 391, 77 S.W. at 664. Then, in *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), the Washington Supreme Court felt that society's interest in protecting family harmony mandated immunity when the tort involved incestuous rape. *Id.* at 243, 79 P. at 788. Many courts, finding the parent-child immunity analogous to interspousal immunity, denied the child a cause of action. See, e.g., *Downs v. Poulin*, 216 A.2d 29, 32 (Me. 1966) (listing cases); *Luster v. Luster*, 299 Mass. 480, 482, 13 N.E.2d 438, 440 (1938), *overruled in part*, *Sorensen v. Sorensen*, 369 Mass. 350, 353, 339 N.E.2d 907, 909 (1975); *McKelvey v. McKelvey*, 111 Tenn. 388, 391, 77 S.W. 664, 665 (1903); *Roller v. Roller*, 37 Wash. 242, 245, 79 P. 788, 789 (1905).

2. See, e.g., *Balts v. Balts*, 273 Minn. 419, 437-38, 142 N.W.2d 66, 78 (1966) (Rogosheske, J., concurring specially); *Reingold v. Reingold*, 115 N.J.L. 532, 535, 181 A. 153, 154-55 (1935), *overruled*, *France v. A.P.A. Transp. Corp.*, 56 N.J. 500, 506-07, 267 A.2d

exchequer,³ the parent-child tort immunity rule precluded recovery by children from their parents, or by parents from their children.⁴ Minnesota adopted the rule in 1908,⁵ later adding the justification that without the rule a proliferation of litigation⁶ and possible erosion of family harmony would result.⁷ Because the rule had no support in English jurisprudence and little basis in American decisions, it eventually succumbed to equitable attacks and became riddled with exceptions.⁸ In the last

490, 494 (1970); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923). The *Small* court stated:

There are some things that are worth more than money. One of these is the peace of the fireside and the contentment of the home; for of such is the kingdom of righteousness. While the family relation of parent and child exists, with its reciprocal rights and obligations, the latter should not be taught "to bite the hand that feeds it," and no such action as the present should be entertained by the courts. . . . It is doubtful if any age promises a sweeter remembrance than that of a happy childhood, spent in the lovelight of kindly smiles and in the radiance of parental devotion. . . . If this restraining doctrine were not announced by any of the writers of the common law, because no such case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai.

Id. at 585-86, 118 S.E. at 16.

3. See *Balts v. Balts*, 273 Minn. 419, 430-31, 142 N.W.2d 66, 73 (1966).

4. See, e.g., *id.* at 429, 142 N.W.2d at 72; *Brennecke v. Kilpatrick*, 336 S.W.2d 68, 70 (Mo. 1960) (reviewing and analyzing cases in support of the immunity rule); *Badigian v. Badigian*, 9 N.Y.2d 472, 473-74, 174 N.E.2d 718, 719, 215 N.Y.S.2d 35, 36-37 (1961) (immunity based on fact that parents and children form a unique type of social unit distinguishable from all other groups), *overruled*, *Gelbman v. Gelbman*, 23 N.Y.2d 434, 438, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 531 (1969).

5. *Taubert v. Taubert*, 103 Minn. 247, 249, 114 N.W. 763, 764 (1908) (unemancipated minor cannot sue parent for tort).

6. See *Miller v. Pelzer*, 159 Minn. 375, 378, 199 N.W. 97, 98 (1924).

7. See *id.* Other courts have advanced similar justifications. See, e.g., *Schenk v. Schenk*, 100 Ill. App. 2d 199, 202, 241 N.E.2d 12, 13 (1968); *Elias v. Collins*, 237 Mich. 175, 177, 211 N.W. 88, 88 (1926) (peace of family and society), *overruled*, *Plumley v. Klein*, 388 Mich. 1, 8, 199 N.W.2d 169, 172 (1972). The immunity rule was also justified on the ground that without such a rule a parent would be forced to take inconsistent positions in that the parent, as plaintiff, would be seeking to divest the child of property subject to parental protection. See *Balts v. Balts*, 273 Minn. 419, 431, 142 N.W.2d 66, 74 (1966). Minnesota abandoned these reasons as make-weight and insufficient. See *id.* at 431-32, 142 N.W.2d at 74. See also *Grilliot & Mishkind, Emancipation From the Family Immunity Doctrine*, 15 AM. BUS. L.J. 305, 307-10 (1977); *McCurdy, Torts Between Parent and Child*, 5 VILL. L. REV. 521, 528-29 (1960); *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1072-77 (1930).

8. See Note, *Intrafamilial Tort Immunity in New Jersey: Dismantling the Barrier to Personal Injury Litigation*, 10 RUT.-CAM. L.J. 661, 672 (1979). Notable exceptions or distinctions include the employer-employee relationship, see, e.g., *Dunlap v. Dunlap*, 84 N.H. 352, 364, 150 A. 905, 911 (1930) (minor child, injured while employed by father who carried liability insurance, could sue the parent for tort); *Signs v. Signs*, 156 Ohio St. 566, 577, 103 N.E.2d 743, 748-49 (1952) (parent in business or vocational capacity not immune from tort action by unemancipated minor child); *Borst v. Borst*, 41 Wash. 2d 642, 658, 261 P.2d 149, 157 (1952) (immunity rule inapplicable when injury to child arises out of parent's operation of business); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932) (parent, as opera-

twenty years, courts have begun to view the immunity with disfavor⁹ because its operation could leave an injured child without a remedy and possibly place the entire burden of liability upon a cotortfeasor.¹⁰ In an attempt to correct these inequities, a significant number of states have abrogated the immunity rule in whole or in part.¹¹ Courts eliminating

tor of school bus, not immune from suit by minor child who was an injured passenger), and willful or malicious torts. *See, e.g.*, *Emery v. Emery*, 45 Cal. 2d 421, 430, 289 P.2d 218, 224 (1955) (unemancipated minor may sue parent for a willful or malicious tort); *Wright v. Wright*, 85 Ga. App. 721, 726, 70 S.E.2d 152, 155 (1952) (no parental immunity for willful or malicious act, provided the act is of such cruelty as to authorize forfeiture of parental authority); *Mahnke v. Moore*, 197 Md. 61, 68, 77 A.2d 923, 926 (1951) (no parental immunity for atrocious acts committed by father in daughter's presence); *Cowgill v. Boock*, 189 Or. 282, 301, 218 P.2d 445, 453 (1950). An unemancipated minor could sue a parent, *see Emery v. Emery*, 45 Cal. 2d 421, 430, 289 P.2d 218, 224 (1955), and an unemancipated minor could sue the estate of a deceased parent. *See, e.g.*, *Davis v. Smith*, 253 F.2d 286, 289-90 (3d Cir. 1958); *Shumway v. Nelson*, 259 Minn. 319, 324, 107 N.W.2d 531, 534 (1961); *Brennecke v. Kilpatrick*, 336 S.W.2d 68, 73 (Mo. 1960). *But see Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891) (suit against estate not allowed). A relatively recent exception has arisen to allow suits after the termination of the family relation. *See Fugate v. Fugate*, 582 S.W.2d 663, 669 (Mo. 1979) (action allowed against divorced, non-custodial parent), *modifying Bahr v. Bahr*, 478 S.W.2d 400 (Mo. 1972). The *Fugate* court justified its departure from the general rule of immunity in Missouri because "immunity from suit in tort deprives an injured party of a particular remedy and therefore should not be extended beyond the point of that which is necessary to assist and support the functioning of an existing family unit." *Fugate v. Fugate*, 582 S.W.2d at 669.

9. *See* cases cited in note 11 *infra*.

10. *See, e.g.*, *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967) (arguments in favor of immunity do not outweigh necessity of affording child a remedy); *Gibson v. Gibson*, 3 Cal. 3d 914, 920, 479 P.2d 648, 651-52, 92 Cal. Rptr. 288, 291-92 (1971) (justice is not served by denying person a remedy simply on the basis of possible collusion between parent and child); *Silesky v. Kelman*, 281 Minn. 431, 441, 161 N.W.2d 631, 637 (1968) (in balancing arguments in favor of parental immunity with those favoring a remedy for the child, court found the child's interests to have more weight); *Briere v. Briere*, 107 N.H. 432, 436, 224 A.2d 588, 591 (1966) (arguments for parental immunity insufficient to deny remedy to unemancipated minors as a class); Brief for Appellant at 13, *Ascherman v. Village of Hancock*, 254 N.W.2d 382 (Minn. 1977) (appellant argued that one result of the parental immunity rule was that the cotortfeasor who was not immune was forced to pay the entire award).

11. At least 21 states have abrogated the parent-child immunity, in whole or in part, by judicial decision or statute. *See, e.g.*, *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967); *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970); *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Trevarton v. Trevarton*, 151 Colo. 418, 378 P.2d 640 (1963); *Petersen v. City & County of Honolulu*, 51 Hawaii 484, 462 P.2d 1007 (1969); *Schenk v. Schenk*, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); *Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975); *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Briere v. Briere*, 107 N.H. 500, 267 A.2d 490 (1970); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967); *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971); *Wood v. Wood*, 135 Vt. 119, 370 A.2d 191 (1977); *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971); *Lee v. Comer*, 224 S.E.2d 190 (W. Va. 1976); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193

the parental immunity rule have adopted four main approaches to abrogation: total abrogation,¹² the reasonable parent standard,¹³ abrogation except for activities associated with family relationships or objectives,¹⁴ and abrogation with specific exceptions.¹⁵ In 1966, the Minnesota

(1963); CONN. GEN. STAT. ANN. § 52-572C (Cum. Supp. 1979); N.C. GEN. STAT. § 1-539.21 (Cum. Supp. 1977) (constitutionality upheld in *Ledwell v. Berry*, 39 N.C. App. 224, 249 S.E.2d 862 (1978), *cert. denied*, 296 N.C. 585, 254 S.E.2d 35 (1979)); S.C. CODE § 15-5-210 (1977).

12. *See, e.g.*, *Petersen v. City & County of Honolulu*, 51 Hawaii 484, 486, 462 P.2d 1007, 1008-09 (1970); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969) (abolished defense of intrafamily immunity for nonwillful torts when liability established). Although a court may not recognize the tort immunity, it can protect the parent by refusing to find the particular conduct actionable in tort. *See Holodook v. Spencer*, 36 N.Y.2d 35, 51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871-72 (1974) (refusing to allow cause of action for negligent supervision).

13. *See Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). The "reasonable parent" standard recognizes a parent's prerogative and duty to exercise authority over his child, but this prerogative must be exercised within reasonable limits. "The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. . . . [W]hat would an ordinarily reasonable and prudent parent have done in similar circumstances?" *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293 (emphasis in original). Commentators have heralded the "reasonable parent" approach because it operates regardless of the nature of the parent's activity while eliminating "the abstruse and often arbitrary distinction between immunity and liability that is inherent in other alternatives." Note, *supra* note 8, at 679; *see* Comment, "The Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity, 47 U. COLO. L. REV. 795, 809 (1976). *See also* Comment, *Parental Immunity: California's Answer*, 8 IDAHO L. REV. 179, 187 (1971) (reasonable parent approach advocated for Idaho); Note, *The Parent-Child Tort Immunity Law in Massachusetts*, 12 NEW ENGLAND L. REV. 309, 331-32 (1976) (reasonable parent approach advocated for Massachusetts); Comment, *Parental Immunity: The Case for Abrogation of Parental Immunity in Florida*, 25 U. FLA. L. REV. 794, 802 (1973) (reasonable prudent parent test advocated for Florida); Comment, *Parent-Child Tort Immunity: A Rule in Need of Change*, 27 U. MIAMI L. REV. 191, 206-07 (1972) (same). Furthermore, the "reasonable parent" approach allows for a case-by-case analysis of claims without the possibility of a meritorious claim being prevented by categories of exclusion. *Compare Gibson v. Gibson*, 3 Cal. 3d at 921-22, 479 P.2d at 652-53, 92 Cal. Rptr. at 292-93 with notes 18-19 *infra* and accompanying text.

14. *Schenk v. Schenk*, 100 Ill. App. 2d 199, 206, 241 N.E.2d 12, 15 (1968). Immunity is preserved "for conduct of either parent or child arising out of the family relationship and directly connected with the family purposes and objectives." *Id.* No immunity was conferred when a 17-year-old child negligently ran into her father with an automobile while he was a pedestrian. *Id.* at 200, 241 N.E.2d at 12.

15. *See, e.g.*, *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). In concluding that the child's action would be permitted, the Wisconsin court abrogated the immunity but preserved two exceptions: "(1) Where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Id.* at 413, 122 N.W.2d at 198. The first exception embraces parental discipline. *See Thoreson v. Milwaukee & Suburban Transp. Corp.*, 56 Wis. 2d 231, 246, 201 N.W.2d 745, 753 (1972). The major criticisms of *Goller* are that it immunizes a parent from liability for obviously negligent or unreasonable conduct, *see Gibson v. Gibson*, 3 Cal. 3d at 921-22, 479 P.2d at 652-53, 92 Cal. Rptr.

Supreme Court permitted a parent to recover from his child,¹⁶ and, two years later, completed abrogation of the rule by adopting the fourth approach,¹⁷ thereby preserving two areas of parental immunity: injuries caused by negligent actions involving the exercise of reasonable parental authority;¹⁸ and injuries resulting from the use of "ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."¹⁹

Although the two remaining circumstances in which courts may apply the parental immunity doctrine do not expressly embrace acts of negligent parental supervision, many injuries to children occur because of such negligence. In *Romanik v. Toro Co.*,²⁰ the Minnesota Supreme Court faced the question whether negligent supervision falls under the rules allowing application of the parental immunity doctrine.²¹ *Romanik* involved a thirteen-year-old plaintiff who injured his hand while operating a Toro snowthrower.²² The plaintiff had been instructed by his father to depress the machine's auger clutch lever by hand instead of with his foot as indicated in the owner's instruction manual.²³ The snowthrower pulled the plaintiff's hand into a partially exposed pulley and drive belt,

at 292-93 (1971); Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, *supra* note 13, at 806 n.54, and that it inevitably results in the drawing of arbitrary distinctions as to when parental conduct falls within or without the immunity guidelines. See *Gibson v. Gibson*, 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293. The potential for arbitrary application is especially evident when construing the second exception of legal duties. See Comment, *supra* at 807-08; cf. *Ourada v. Knahmuhs*, 301 Minn. 131, 221 N.W.2d 659 (1974) (parental discretion in providing housing immunized father's negligence in not maintaining stairway); *Cherry v. Cherry*, 295 Minn. 93, 203 N.W.2d 352 (1972) (discretion in housing includes use of extension cord); *Thomas v. Kells*, 53 Wis. 2d 141, 146-48, 191 N.W.2d 872, 874-75 (1971) (remanded for determination whether stairway was part of father's "home").

16. *Balts v. Balts*, 273 Minn. 419, 433-34, 142 N.W.2d 66, 75 (1966).

17. See *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968).

18. Minnesota adopted the exceptions of *Goller v. White*, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963), but added the word "reasonable" to the first exception concerning the use of parental authority. See *Silesky v. Kelman*, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968). Thus, the immunity in Minnesota does not extend to all injuries caused by parental performance of legal duties. See Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, *supra* note 13, at 811.

19. See *Silesky v. Kelman*, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968). The duties in the second exception now receive a restrictive reading in Wisconsin and the term "other care" embraces only legal duties and not supervision. Compare *Lemmen v. Servais*, 39 Wis. 2d 75, 78, 158 N.W.2d 341, 343 (1968) (failure to instruct six-year-old child as to safety procedures in alighting from school bus within "other care;" considered aspect of education) with *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 634-35, 177 N.W.2d 866, 869 (1970) ("other care" limited to legal duties).

20. 277 N.W.2d 515 (Minn. 1979).

21. *Id.* at 519.

22. *Id.* at 517.

23. *Id.* at 519 & n.5.

severely injuring the hand.²⁴ The jury, by special verdict, found defendant Toro eighty-five percent and the father fifteen percent negligent.²⁵ On appeal by both defendants, the Minnesota Supreme Court affirmed, dismissing Toro's contentions that the jury returned an excessive verdict and that the evidence failed to support the determination of negligence.²⁶ The court then turned its attention to the father's claim of parental immunity from suit.²⁷

Because the father's conduct in *Romanik* did not involve parental discretion in the provision of "food, clothing, housing, medical and dental services, and other care," the second rule allowing parental immunity was found inapplicable.²⁸ In its discussion of the first rule, the court determined that the jury's finding that the father was negligent could encompass either a finding of negligent supervision or negligent instruction.²⁹ A review of the relevant testimony convinced the court that the jury's finding of negligence was "more likely based on the father's instructions . . . than on the broader finding of negligent supervision."³⁰ As "an affirmative act of negligence involving a foreseeable, unreasonable risk of injury to a child," the negligent instruction was held to fall outside the first area of immunity.³¹ Therefore, the court dismissed the father's claim of parental immunity.³²

In making its decision, the *Romanik* court examined cases from Michigan and Wisconsin, two jurisdictions that have adopted the fourth abrogation approach.³³ These jurisdictions have taken disparate courses in their analyses of negligent supervision. Michigan construes the first exception broadly and holds that parents guilty of negligent supervision are immune from suit.³⁴ Although Wisconsin does not place negligent super-

24. *Id.* at 517.

25. *Id.* The jury also found Toro Company strictly liable for selling a product in a defective condition unreasonably dangerous to users. *Id.*

26. *See id.* at 517-18.

27. *See id.* at 518-20.

28. *See id.* at 518-19. The *Romanik* court also concurred with Wisconsin's more restrictive interpretation of "other care" as contained in the second exception. *See id.*; note 19 *supra*.

29. *See* 277 N.W.2d at 519.

30. *Id.* at 520.

31. *Id.*

32. *Id.*

33. *See id.* at 519.

34. *See, e.g.,* Hush v. Devilbiss Co., 77 Mich. App. 639, 259 N.W.2d 170 (1977) (extending negligent supervision protection to a grandparent *in loco parentis*); Paige v. Bing Constr. Co., 61 Mich. App. 480, 233 N.W.2d 46 (1975) (negligent supervision within first exception). The Michigan Court of Appeals placed negligent supervision within the first immunity because the court felt that authority and supervision could not be logically distinguished on a case-by-case basis. *See id.* at 485-86, 233 N.W.2d at 49.

vision within the first exception,³⁵ acts of negligent supervision may fall within the second exception if the act in question represents a legal obligation of the parent to the child,³⁶ is essentially parental in nature,³⁷ and involves the specific conduct encompassed by the exception.

Because the *Romanik* court determined that the jury based its verdict upon a finding of negligent instruction,³⁸ the court's conclusion should have precluded any need to address negligent supervision. The *Romanik* court, however, evidently felt sufficiently troubled by the negligent supervision question that, after engaging in an analysis of the Michigan and Wisconsin approaches, it decided to "leave . . . construction of the scope of the *parental-authority exception* to a case where liability is based on a clear finding of negligent supervision."³⁹ The court's language indicates that Minnesota will probably treat negligent supervision under the first exception. Such an approach could lead to the eventual adoption by the Minnesota court of a general rule granting parental immunity from suits for negligent supervision⁴⁰ instead of Wisconsin's restrictive case-by-case determination within the second exception.⁴¹

The difficulty in resolving the negligent supervision question centers around the desire of courts to immunize parents from tort liability when the injuries to their children arise out of daily occurrences.⁴² Most jurisdictions that have abrogated parental immunity recognize the need to leave some area of parental conduct immune from tort liability due to the impossibility of guarding against all possible injuries.⁴³ Complete

35. *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 247, 201 N.W.2d 745, 753 (1972); *see* 277 N.W.2d at 519.

36. *See* *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 634-35, 177 N.W.2d 866, 869 (1970).

37. *See id.* at 633, 177 N.W.2d at 869.

38. 277 N.W.2d at 520.

39. *Id.* (emphasis added).

40. *Cf. Bell v. Schwartz*, 422 F. Supp. 257, 259 (D. Minn. 1976) (court concluded that Minnesota would adopt the Michigan approach and find negligent supervision within the first exception).

41. *See, e.g., Thomas v. Kells*, 53 Wis. 2d 141, 191 N.W.2d 872 (1971).

42. *See, e.g., Schenk v. Schenk*, 100 Ill. App. 2d 199, 206, 241 N.E.2d 12, 15 (1968) (immunity preserved when "the carelessness, inadvertence or negligence is but the product of the hazards incident to inter-family living and common to every family"); *Rodebaugh v. Grand Trunk W.R.R.*, 4 Mich. App. 559, 566, 145 N.W.2d 401, 405 (1966) ("A sensible rule will allow children to recover damages . . . but yet not subject parents to legal action for commonplace failures in performance of parental duties."); *Lastowski v. Norge Coin-O-Matic, Inc.*, 44 A.D.2d 127, 130, 355 N.Y.S.2d 432, 435 (1974) (heavy burden would be added to parenthood if parents were subject to liability for accidents arising out of daily experiences); *Lemmen v. Servais*, 39 Wis. 2d 75, 79-80, 158 N.W.2d 341, 344 (1968) (*Goller* rule not meant to impose liability for daily experiences). *But see* *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 177 N.W.2d 866 (1970) (court seems to have abandoned the *Lemmen* interpretation of the *Goller* rule; parents held liable for injuries arising out of child's play).

43. *See, e.g., Cherry v. Cherry*, 295 Minn. 93, 203 N.W.2d 352 (1972). The *Cherry* court quoted with approval the language of *Lemmen* that construed the *Goller* rule to grant

abrogation of the immunity could lead to a flood of cases burdening court calendars as well as increasing the possibility of "cakewalk" or collusive recoveries.⁴⁴ Furthermore, judicial reluctance to allow claims for negligent supervision may stem from the possibility that a cotortfeasor could use negligent supervision as the basis for a contribution action against the parent. Thus, although the child may desire to avoid intrafamily conflict, the third party complaint may cause such a result.⁴⁵

Minnesota should consider a recent New Jersey approach as a means of achieving a balance between the child's right to recover, the parent's need to know what type of conduct is actionable, and the public's desire to prevent overcrowded court calendars. In *Convery v. Maczka*,⁴⁶ a child sued his parent and a neighbor for negligent supervision when he jumped off a chair in the basement and injured himself after he had been left in the basement without parental supervision.⁴⁷ The *Convery* court first analyzed the specific conduct to see if it fit within the terms of the two-exception approach.⁴⁸ Arguably, the court refused to find that the parental conduct fell within the exceptions because the exceptions should be "strictly limited to parental responsibilities and functions the performance or nonperformance of which is actionable in tort."⁴⁹ The court then analyzed the conduct in relation to the "dangerous instrumentality" doctrine, which imposes upon the parent liability for injuries to third persons caused by a child's improperly supervised use of a dangerous instrumentality.⁵⁰ Apparently, the *Convery* court was prepared to extend

immunity for injuries arising out of daily occurrences even though by the date of this decision, the *Lemmen* interpretation had apparently been abandoned by the Wisconsin courts. *Id.* at 95, 203 N.W.2d at 353-54; see note 42 *supra*.

44. For a discussion of the correlation between abrogation of parent-child immunity in tort actions and the incidence of "cakewalk" liability, see Casey, *The Trend of Interspousal and Parental Immunity—Cakewalk Liability*, 45 INS. COUNSEL J. 321, 327-34 (1978).

45. Note, *supra* note 8, at 677-78. This occurred in *Romanik* as the plaintiff sued Toro, and Toro impleaded the father for contribution. At trial the father was changed to a direct defendant. See 277 N.W.2d at 517 & n.1. For a discussion of the law of contribution in Minnesota, see Note, *Contribution and Indemnity—An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109 (1979).

46. 163 N.J. Super. 411, 394 A.2d 1250 (Law Div. 1978). The holding in this case appears to be in direct conflict with *Fritz v. Anderson*, 148 N.J. Super. 68, 371 A.2d 833 (Law Div. 1977). To date, no New Jersey appellate court has resolved the apparent conflict between these trial court opinions.

47. 163 N.J. Super. at 413, 394 A.2d at 1252.

48. See *id.* at 415-17, 394 A.2d at 1253. Although New Jersey has not actually adopted the two exception approach as the *ratio decidendi* of a case, the intermediate appellate court has approved the exceptions under limited circumstances. See *Gross v. Sears, Roebuck & Co.*, 158 N.J. Super. 442, 447, 386 A.2d 442, 445 (App. Div. 1978) (dictum).

49. See 163 N.J. Super. at 415-17, 394 A.2d at 1253. After stating that the exceptions were to be interpreted narrowly, the court shifted its analysis to possible avenues of recovery. See *id.* at 415-17, 394 A.2d at 1253-54.

50. The "dangerous instrumentality" doctrine requires that the child had use of or access to a dangerous instrumentality without adequate supervision or was not controlled

this doctrine to the minor's own injuries.⁵¹ Although the court found that the injury did not involve a "dangerous instrumentality," the child was allowed to present a broader cause of action paralleling traditional negligence principles when the parent's conduct falls outside the narrowly construed exceptions.⁵² Under this approach, the parent owes a duty of care to the child identical to that duty owed by any other person with a special relationship to the child,⁵³ for example, a school principal,⁵⁴ a summer camp proprietress,⁵⁵ or grandparents.⁵⁶ Thus, under the *Convery* scheme, parents owe no greater duty to the child than does a third person, but they cannot expect special protection outside the narrowly interpreted exceptions.

or curbed despite the child's inclination towards dangerous conduct. *See id.* Minnesota adopted a similar approach in *Republic Vanguard Ins. Co. v. Buehl*, 295 Minn. 327, 204 N.W.2d 426 (1973). Citing as authority the New Jersey decision in *McDonald v. Home Ins. Co.*, 97 N.J. Super. 501, 235 A.2d 480 (App. Div. 1967) (action against parents based upon their alleged negligence in failing to supervise and control child when they knew of latter's violent and dangerous habits), the court in *Republic Vanguard Ins. Co.* stated:

Since the elements of such a cause of action [injury caused by negligent use of motorcycle] involve a breach of duty by parents to exercise reasonable supervision and control over their minor child so as to prevent him from creating an unreasonable risk of bodily harm to others, liability is not established unless it is also proved that the parents know, or have reason to know, of the necessity and opportunity for exercising such control and are chargeable with knowledge of the dangerous or violent propensities of the child. In short, liability of the parent arises from his active parental misconduct in creating an unreasonable risk of harm to others by placing an instrumentality into the hands of a minor child who the parents know, or ought to know, is unable to utilize it without endangering innocent third parties.

295 Minn. at 332, 204 N.W.2d at 429.

51. *See* 163 N.J. Super. at 416, 394 A.2d at 1253. New York recently rejected the notion that a child may recover from its parent under the "dangerous instrumentality" doctrine. *See Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978). Although the doctrine imposes liability upon parents for injuries their children inflict upon third persons, the *Nolechek* court refused to extend the theory for fear that "the practical consequences of permitting a child to recover on the 'dangerous instrument' theory could be serious and unfortunate." *Id.* at 338, 385 N.E.2d at 1272, 413 N.Y.S.2d at 344.

52. *See* 163 N.J. Super. at 416, 394 A.2d at 1253.

53. *See id.*

54. *E.g.*, *Titus v. Lindberg*, 49 N.J. 66, 73, 228 A.2d 65, 68 (1967) (school personnel have duty to exercise reasonable supervisory care on behalf of the children entrusted to them).

55. *E.g.*, *Brown v. Knight*, 362 Mass. 350, 285 N.E.2d 790 (1972) (summer school proprietress who took custody of child for pay had duty to protect child from foreseeable harm).

56. *E.g.*, *Broome v. Horton*, 83 Misc. 2d 1002, 1006, 372 N.Y.S.2d 908, 913 (Sup. Ct. 1975) (duty of care is similar to that of a neighbor, teacher, or babysitter). Jurisdictions that have not completely abrogated the parent-child immunity rule are divided as to whether grandparents are immune from suit. *Compare* *Busillo v. Hetzel*, 58 Ill. App. 3d 682, 374 N.E.2d 1090 (1978) (grandparents liable) with *Hush v. Devilbiss Co.*, 77 Mich. App. 639, 259 N.W.2d 170 (1977) (grandparent not liable for negligent supervision).

The *Convery* court echoes New York case law in refusing to find a separate cause of action for negligent supervision,⁵⁷ but it does recognize a cause of action within the limits of reasonable foreseeability against persons with a special relationship to the child.⁵⁸ Under this analysis, a parent will be "liable for failure to exercise reasonable care, precaution and vigilance" as measured by the child's understanding of the risks of injury and their foreseeability by the parent.⁵⁹ Therefore, under the *Convery* approach, parents will continue to be immunized for most injuries resulting from daily occurrences, yet the child will be protected from situations involving inherent danger.

Although the *Romanik* court's decision to delay resolution of the parental supervision issue may lead to less confusion in Minnesota than now exists in Michigan and Wisconsin, Minnesota presently has no clear rule to follow. It is hoped that the court will consider the *Convery* approach in arriving at a definitive solution. Meanwhile, *Romanik* evinces the principle that parental instruction sufficiently negligent to constitute an affirmative act endangering a child is outside both exceptions to the abrogation of the parent-child immunity doctrine.

Workers' Compensation—INTERVENORS' RIGHT TO REIMBURSEMENT—*Brooks v. A.M.F., Inc.*, 278 N.W.2d 310 (Minn. 1979).

Many Minnesota workers covered by workers' compensation¹ also

57. See *Holodook v. Spencer*, 36 N.Y.2d 35, 47, 324 N.E.2d 338, 344, 364 N.Y.S.2d 859, 868 (1974).

58. See *Convery v. Maczka*, 163 N.J. Super. at 416, 394 A.2d at 1253.

59. *Id.*

1. Under the Minnesota workers' compensation law, MINN. STAT. §§ 176.011-82 (1978 & Supp. 1979), an injured employee is entitled to compensation from the employer's compensation carrier for an injury shown to be work related. See *id.* § 176.021(1) (1978) ("arising out of and in the course of employment").

Nearly all Minnesota workers are covered under the Minnesota workers' compensation law for work-related illness and injury. See *id.* § 176.041(1) (Supp. 1979) (excluding employees of railroads engaged in interstate commerce, family farm employees, various other agricultural workers, and certain other occupations from coverage by workers' compensation). In 1973, 38,953 work-related injuries were reported in Minnesota. By 1978, this number had increased to 55,536. See MINNESOTA WORKERS' COMPENSATION STUDY COMMISSION, A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR 205 (1979) [hereinafter cited as STUDY COMM'N].

Workers' compensation statutes were enacted by state legislatures throughout the nation starting in 1902. See 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.20 (1978). Their purpose was to assure speedy compensation by employers to workers for work-related injuries. See, e.g., *New York C.R.R. v. White*, 243 U.S. 188, 201 (1917). By 1920, all but eight states had adopted compensation acts. See 1 A. LARSON, *supra*, § 5.30,